Supreme Court, U.S.
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No. 01

IN THE

Supreme Court of the United States

October Term, 2001

Richard Lloyd Carr,

Petitioner, Pro se

v.

FORBES, INCORPORATED;
MATTHEW SCHIFRIN; JOHN DOES,

Respondents.

On Petition For Writ Of Certiorari

From The United States Court Of Appeals

For The Fourth Circuit

Richard Lloyd Carr
Pro se
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93pp

No.
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Richard L. Carr
Petitioner
v.
Forbes Incorporated;
Matthew Schrifrin; and John Does

AFFIDAVIT
Service of Process

State of Arizona County of Maricopa

BEFORE ME, the undersigned authority, personally appeared Richard Lloyd Carr, who, being duly sworn, deposed as follows:

My name is Richard Lloyd Carr. I am over twenty-one (21) years of age, of sound mind, capable of making this Affidavit, and with personal knowledge of the facts cited herein, hereby state:

A true and correct copy of the enclosed Petition For Writ of Certiorari was served as indicated, via first class certified mail, postage prepaid and a return receipt requested, upon Wallace Lightsey, Attorney for Respondents: Forbes Incorporated; Matthew Schifrin and John Does at Wyche Burgess Freeman and Parham 44 E Camperdown Way Greenville, South Carolina 29601

Richard Lloyd Carr

11/03/01

OFFICIAL SEAL
GARY KAPLAN
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires Nov. 14, 2003

October 20, 2001

QUESTIONS PRESENTED

(1) Was the decision of the Fourth Circuit Court of Appeals so violative of Petitioner's Seventh Amendment right to a Trial by a Jury that this Court should exercise its power of supervision to (a) review and correct the clear conflict of interest manifest in the Courts stated obligation to protect the interests of the Respondent's First Amendment rights when this stated obligation was accomplished by establishing the Respondent's First Amendment rights as more important than the Seventh Amendments rights of the Petitioner.

(2) Was the decision of the Fourth Circuit Court of Appeals so violative of Petitioner's Seventh Amendment right to a Trial by a Jury that this Court should exercise its power of supervision to (a) review and correct the clearly erroneous fashion in which the doctrine of a public person or a limited public-person was interpreted and applied and (b) vacate (or order vacated) on Seventh Amendment grounds the Summary Judgment granted to the Respondent against Petitioner.

(3) Was the decision of the Fourth Circuit Court of Appeals so violative of Petitioner's Seventh Amendment right to a Trial by a Jury that this Court should exercise its power of supervision to (a) review and correct the clearly erroneous fashion in which the Court assumed the role of the finder of fact in this case, and thereby denied the Petitioner's right to a Trial by Jury.

(4) Was the decision of the Fourth Circuit Court of Appeals so violative of Petitioner's Fourteenth Amendment right to Equal Protection under the Law that this Court should exercise its power of supervision to (a) review and correct the clearly erroneous fashion in which the Court, using a Test with

a series of questions so horrifically biased in favor of the Courts stated purpose of jealously protecting the First Amendment rights of the Respondent that the Petitioner was denied anything approaching equal protection under the law.

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. See Supreme Court Rules 14.1(b) and 29.6

TABLE OF CONTENTS

QUESTIONS PRESENTED.....*iii*

PARTIES TO THIS PROCEEDING.....*v*

TABLE OF CONTENTS.....*vi*

TABLE OF AUTHORITIES.....*viii*

OPINIONS BELOW.....Appendix A and Page 3
Appendix B and Page 3

STATEMENT OF JURISDICTION.....4

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED.....4

HISTORICAL PROVISIONS INVOLVED.....5

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE PETITION.....7

CONCLUSION.....26

REASONS FOR GRANTING THE PETITION

I. This Petition should be granted because the Seventh Amendment was incorporated in the Constitution of the United States of America specifically for the purpose of preventing the powerful and the government from establishing rules and procedures which would prevent a citizen from his/her right to a trial by Jury.

II. This petition should be granted to overturn a series of Rules and Tests which, if improperly administered by a Court could effectively create the equivalent of an Amendment to the Constitution not having been presented to the several states for ratification.

III. This Petition should be granted to remove a judicial conflict of interest established when the Court creates a Rule, then establishes a series of tests through which the Rule would be administered; and then grants to itself the exclusive right to make factual decisions regarding unproven assertions by one party to the litigation, and thereby reach a conclusion regarding the Test.

IV. This petition should be granted to remove a process whereby the Court, in an effort to "jealously" protect a "the more important" Constitutional rights of one citizen at the expense of the "less important" Constitutional rights of another.

TABLE OF AUTHORITIES

Seventh Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

Declaration of Independence

Blackstone's Thesis of 1770

Madison's Federalist Paper dated November 23, 1787

Decision of the Fourth District Court of Appeals (Carr v. Forbes)

Decision of the United States District Court for the District of South Carolina at Greenville. (Carr v. Forbes)

Merriam-Webster 1996 Dictionary of Law

Socrates on Rhetorical Hyperbole

Biltmore & Carolina Line v. Redman

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Respondents.

On Petition For Writ Of Certiorari

To The United States Court Of Appeals

For The Fourth Circuit

Petitioner Richard Lloyd Carr hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

The United States District Court for the District of South Carolina at Greenville denied the Petitioners Constitutionally guaranteed Seventh Amendment right to a trial by a jury and Fourteenth Amendment right to equal protection under the law by granting Respondents motion for Summary Judgment. The Court granted Summary Judgment based on several factors, none of which are supported Constitutionally nor Statutorily. The Court concluded that the *facts* establish that the Plaintiff was a public figure; and was unable to prove that the Respondent had exhibited either a Reckless Disregard for the Truth nor Malice.

The Fourth Circuit Court of Appeals affirmed the District Court's decision rejecting Petitioner's argument that the Plaintiff was entitled to a Trial by a Jury. The issue of whether or not Forbes Incorporated and Matthew Schifrin committed common law libel was never allowed to be discussed in the Court. But rather the Court was finessed into accepting a lengthy, esoteric and exceptionally subjective evaluation of *"facts"* to determine if the Plaintiff had the standing to file a suit against the defendant. In order to accomplish this complete end-run around the Plaintiff's Constitutional rights, the Court created and imposed a procedure which required the administration of a series of Tests, the purpose of which was to discover recent historical circumstances regarding the Petitioner.

Then contrary to long established procedure wherein the Court decides issues of law and a Jury decides issues of fact, the Court, apparently having reached the conclusion

that a Jury would not have sufficient intellectual capacity to fulfill their constitutional duty, established themselves as the single entity capable of making a factual determination as to whether or not the Plaintiff met the Test.

Petitioner respectfully submits that the judgment against him disregards his fundamental constitutional right to a trial by jury; to equal protection under the law; and that the decisions of the Court regarding the use of Tests that carry neither statutory nor constitutional standing fail to meet any reasonable application of the fair use doctrine, and respectfully requests review by this Court.

Further, Petitioner respectfully submits that the above referenced Test is so biased that even in the event that it is determined that "a" Test is appropriate and in the unimaginable event that the Court could anoint itself as the sole determination of the facts; that the Test, as administered, can not meet any Fourteenth Amendment test of equal justice under the Law.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit affirming the decision of the District Court is set fourth as Appendix A to this petition at pages 27 through 49 The opinion of the United States District Court at Greenville, South Carolina is set forth as Appendix B to this petition at pages 50 through 83

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 1, 2001. This court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.[1]

Section 1 of the Fourteenth Amendment of the United States Constitution provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

---

[1] U.S. Const. amend. VII. A comprehensive history of the Seventh Amendment can be found in Edith G. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) and Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973).

HISTORICAL PROVISIONS INVOLVED

The Declaration of Independence reads, in part, as follows:

> *".....The history of the present King of Great Britain [George III] is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.....*
>
> *He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:*
>
> *For depriving us in many cases of the benefits of Trial by Jury."*

STATEMENT OF THE CASE

Under date of July 7, 1997, Forbes, Inc. published an article authored by Matthew Schifrin entitled "Moonshine Bonds" in its internationally circulated publication, Forbes Magazine. The primary focus of that article was Richard Carr, a civil engineer employed by a private engineering firm, Interwest Management, Inc. The article was highly defamatory of Carr personally and of his role in several construction projects in which his employer had previously been involved, as well as a toll road project in Greenville County, S.C. known as the Southern Connector, on which he was working at the time

of the publication. On June 18, 1999, Carr filed this defamation action against both Forbes, Inc. and Schifrin. Carr's complaint also asserted a civil conspiracy cause of action.

On September 5, 2000, Forbes, Inc. and Schifrin moved the District Court for an order granting them summary judgment based upon the grounds that:

1. *The article that is the subject of this lawsuit is privileged and protected under the First Amendment of the United States Constitution and the Constitution and common law of South Carolina in that:*

   a. *Most of the statements of which plaintiff complains are expressions of opinion and rhetorical hyperbole;*

   b. *The alleged defamatory factual statements are substantially true; and*

   c. *The plaintiff is a public figure, and there is no evidence that the defendants published any statement in the article with "actual malice."*

2. *The plaintiff failed to commence this action within the statutory limitation period for libel and slander.*

3. *The plaintiff has failed to state a valid claim for civil conspiracy, and has no evidence to support such a cause of action.*

After hearing oral argument on September 28, 2000,

Judge Anderson informed the parties via a facsimile on October 2, 2000, of his decision to grant Forbes, Inc. and Schifrin summary judgment based upon his conclusion that Carr was a public figure as a matter of law and could not meet the "clear and convincing" constitutional malice standard. The judge instructed the Respondents to submit a proposed order, which Respondents did on October 13, 2000. Judge Anderson executed and filed this Order, without significant alteration, on November 9, 2000. Carr timely filed his notice of appeal on December 6, 2000.

On February 14, 2001, the Petitioner filed an appeal with the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia. Oral Arguments were held on June 7, 2001 and on August 1, 2001 the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the District of South Carolina at Greenville.

REASON FOR GRANTING THE PETITION

This is an important case from several perspectives:

I

It is without question that free speech rights provided by the First Amendment must be protected. Certainly, in its decision of August 1, 2001, the Court supported that long standing objective by referencing that it recognized that defamation claims potentially chill the free speech rights jealously protected by the First Amendment. The Petitioner contends however, that the Court was not established to jealously protect the Respondents rights provided by the First Amendment at the expense of the Petitioners Seventh

Amendment rights.

Our forefathers included as a part of the First Amendment to the Constitution, a provision which gave the citizens of this country an absolute right, some might consider it to be a responsibility, to speak freely; to laud or criticize the government. And as such, Courts have long held that the government cannot be libeled.

The Fourth District Court of Appeals, presumably in its effort to "jealously" protect the rights of the Respondent's First Amendment rights, erred and in so doing circumvented one of the most cherished hopes of founders of this great nation, a stated objective of the Declaration of Independence and the written word of the Constitution of the United States of America: The Seventh Amendment right to a Trial by a Jury.

Errors of the well intentioned often start small, then grow exponentially as additional errors, the well known slippery steps, are made in an effort to establish some sort of legitimacy to the initial error. In what was perhaps decision intending to support the nation's need to abolish segregation in the Southern United States, the United States Supreme Court, in New York Times v. Sullivan expanded the application of that Amendment to include an official of the government. Hence, an official of the government could not be libeled.

The next step was established when the Court subsequently concluded that a government official included any public person, celebrities, etc. The next step down this slippery slope was reached when the Court concluded that a

public person could, in theory, include anyone in any capacity at any level. This step, perhaps more of a leap than a step, was acknowledged to be problematic. As such, the Court concocted the next step. A test. The purpose of the test was to analysis information regarding an individual to determine if that individual was a public-person. Then in the next slippery step the Court allowed that in some instances an individual could be a public person for limited purposes.

Thus Common Law Libel is neutered. Blackstone's mid 1700's thesis that: " *(If) he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity,"* needs to be rewritten. Today, a more accurate version might be as foloows: *(If) he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity; unless the individual who is the subject of that which is published does not have sufficient resources to prove with clear and convincing evidence that the document was both false and was published with Malice*." Even the Court acknowledges such proof approaches the impossible.

The Petitioner, and likely all true believers in liberty, certainly the founding fathers, believe(d) strongly that freedom of speech and in particular the freedom of the press plays a critical role in keeping our government true to its constitutional mission. As such, the Court jealously protects that freedom. To such an extent that on occasion, the Court has allowed itself to be finessed into supporting arguments that may be deeply intellectual that the objective of the case in question is lost.

In this case, the Respondent, thundering the need to

protect the first amendment rights of the press, stampeded a Court, eager to "jealously" protect the rights of the Press, to such an extent that the entire issue in litigation was converted from whether or not the Respondent so defamed the Petitioner that the Petitioner's now destroyed reputation precludes employment in any position of responsibility, to whether or not the Petitioner is a con man or a criminal. As the Court so gratuitously pointed out in the August 1, opinion:

> *".....The record before us certainly does not prove that Carr is a con-man or a criminal....."*

On what basis did the Petitioner become the Defendant, and on what basis did the Respondent become the Plaintiff? The whole of the decision by both the District Court and the Fourth District Court of Appeals hinges not a wit on whether or not the Respondent defamed the Petitioner, but whether or not the Petitioner fails the terms of the Court's Test.

A Test that is all but impossible to pass. Is it conceivable that an entity that is so eager to "jealously" protect the right of free speech that the entity would create a Test that has built in bias. It is inconceivable that such would not be the case. If a Test with built in bias is to be administered, then who should judge the Test? Those who prepare the Test? I hardly think so. In Madison's Federalist paper to the People of New York on November 23, 1787, he wrote:

> *"No man is allowed to be a judge in his own*

cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time....."

Does a Judge, because he or she is a Judge rise above Madison's concern? Is the Court, in its effort to "jealously" protect the right of free speech, exempt from the possibility of the abuse of power. When, over the course of history, this nations men and women acted beyond their authority, did they not believe that their act, albeit an abuse of power, was truly in the best interest of the people of the United States. The founding fathers were not convinced of the infallibility of the Judges and set in place a series of remedies to prevent such circumstance from developing.

The Court states that whether a person has achieved the status of a limited-purpose public figure is a question of law, which we (the Court) consider de novo: "In theory, over again: as if for the first time." Yet nothing of the sort was conducted. Most, if not all of the "facts" which the Judges reference in the decision were simply unsupported allegations of the Respondent including:

a. The claims from a plaintiff's attorney regarding the Apache Junction matter, and

b. Statements in the form of affidavits of several of the Respondents witnesses which

the District Court refused to allowed to be scheduled as a result of the Respondents perpetual failure[2] to meet the schedule as established by the District Court.

If, as Madison prophesied, "a body of men are unfit to be both judges and parties at the same time," Should not the Court be precluded from judging the factual circumstances regarding the application of a the Court's Test, the stated purpose of which is assist the Judges in their zeal to "jealously" protect the right of free speech? Is this not particularly true when questionable procedure results in the abrogation of the Petitioners Seventh Amendment right to a jury trial?

Therefore, if for no other reason this Petition should be granted because there existed a clear conflict of interest in the Court's expressed objective to "jealously" protect the rights of the Respondent at the expense of the Petitioners Seventh Amendment rights.

II

There are other compelling reasons to grant this petition. Petitioner filed the Libel suit against Respondent

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[2] The Respondents "failure" to present the complete list of the Respondents witnesses in time to be deposed resulted in a coup for the Respondent. The Court subsequently allowed the unproven comments of those witnesses to be incorporated in the record in the form of affidavits.

in Federal court asking for a trial by Jury. That Libel is a tort and thus is, without question, a matter of Common Law. The value of the controversy by any measure far exceeds twenty dollars, thus the Seventh Amendment clearly applies:

> *In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.*

According to the Supreme Court in Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) The (Seventh) Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

Thus, if the Seventh Amendment applies and if, as the Supreme Court has previously decided, "one of its (Seventh Amendment's) primary purposes is that "issues of law" are resolved by the Court and "issues of fact" are to be determined by the jury," then the Petitioner finds no constitutional provision for the Court to deny the Petitioner a Trial by Jury.

The Court's decision is replete with wording such as

the following examples:

1. ",..... the facts before us demonstrate (emphasis added) a public controversy over the soundness of privately financed public projects...."

Most of the "facts[3]" described in the Respondents briefs to the Court are simply the unproven allegations of the Respondent. The Court accepted as "facts" the claims from unsettled litigation, and excerpts from the affidavits of a number of the Respondents proposed [4] "witnesses" whose testimony was never taken. No witnesses were allowed to be present, not was a single Juror was provided the opportunity to consider those facts.

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[3] The Respondent's brief to the Fourth District Court of Appeals is saturated with comments that were never and could never be established as factual in any Court of Justice.

[4] Having failed to meet a single date in the schedule established by the District Court, the Respondent, at the last possible moment identified a number of witnesses for deposition. The District Court refused to delay the matter further and the depositions of these witnesses were not allowed to be scheduled. Excerpts from affidavits of these witnesses appear in numerous sections of the Respondents subsequent Court briefs including the response to Petitioners appeal to the Fourth District Court. The Decision rendered by the United States District Court included quotes from 13 individuals, of this number only 2 were ever allowed to be deposed or questioned.

2. ".....a public debate ensued over whether the facts (emphasis added) alleged in the suit indicated that Interwest Carolina's participation in the Southern Connector would result in similar problems."

Not a single Juror was allowed to hear the "facts" were unproven allegations that regarding the referenced suit that was subsequently settled.[5] Nor was a jury allowed to hear the "fact" that the Petitioner was not a party to the suit.

3. ".....Indeed, the suit led South Carolina authorities to investigate Interwest Carolina to determine whether its contract to build the Southern Connector should be canceled...."

Yet not a single representative of the State of South Carolina was allowed to be examined in Court to testify that, as a matter of fact, after an extensive investigation it was determined that the allegations were unfounded and that the Interwest Carolina contract should continue.

4. ".....The fact that the controversy (emphasis added) addressed by Forbes stirred public debate may be enough to satisfy the requirement that a true public controversy gave rise to the publication....."

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[5] The Petitioner was not a named party in the referenced suit, nor has the Petitioner ever received notice in any form whatsoever suggesting that the Petitioner was a subject of an investigation by a law enforcement or regulatory agency. The Petitioner has never plead no contest, has never been arrested and has never been found guilty of any crime or criminal activity whatsoever.

Certainly the media can both report and create news. It is equally certain that a more controversial article sells more copies of the magazine. A jury having heard all the evidence might well have concluded that in fact: "Forbes stirred public debate like a wind might stir a small fire. Yet, no panel of Jurors heard this argued in a Court of Law.

The Court's decision included the fact that the Court had devised a five-factor test to determine whether the Petitioner has thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status. The five elements of the Test ask whether: (1) the plaintiff has access to channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the controversy, (3) the plaintiff sought to influence the resolution of the controversy, (4) the controversy existed prior to the publication of the defamatory statements, and (5) the plaintiff retained public figure status at the time of the alleged defamation.

The Petitioner, without acknowledging that the above Test, as written and administered, meets any reasonable review of "equal justice under the law," recognized the authority of the Court to impose a Test. The Petitioner however asserts that neither the Seventh Amendment as adopted; nor the above referenced Supreme Court distinction whereby issues of fact are to be determined by the jury include a references which might qualify which facts are to be determined by the jury. Neither document includes terms or phrases reserving the determination of specific facts to the Court. The wording: issues of fact are to be determined by the jury, is all

inclusive.

The Petitioner however asserts that the rights accorded under the Seventh Amendment were denied when the Court, rather than a Jury under appropriate instructions by the Court, made the determination of the issues of fact. It is all the more tragic when it is fully understood that the decision made by the Fourth District Court was based, in substantial part, on unproven allegations presented to the Court as facts, by the Respondent.

Therefore, if for no other reason this Petition should be granted because the rights accorded to the Petitioner under the Seventh Amendment were denied by the Court.

III

Yet there are other compelling reasons to grant this petition. Section 1., of the Fourteenth Amendment provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Petitioner filed a Libel suit against Respondent in Federal Court asking for a trial by Jury. The Court, in its August 1, 2001 decision, informed the Petitioner that the Court's responsibility included that of jealously protecting

(emphasis added) the free speech rights accorded by the First Amendment.

The Court's decision continued:

> *"We (The court has) have devised a five-factor test to determine whether the plaintiff has thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status. We consider whether (1) the plaintiff has access to channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the controversy, (3) the plaintiff sought to influence the resolution of the controversy, (4) the controversy existed prior to the publication of the defamatory statements, and (5) the plaintiff retained public figure status at the time of the alleged defamation."*

The Court in the August 1, 2001 decision then ruled that the Petitioner is a limited-purpose public figure, and as such can only recover in defamation if Respondent acted with actual malice in publishing the article. The Court continued by ruling that "Proof of falsity is not enough." And further that the Petitioner must prove that the Respondent "made the [false] statement with knowledge that it was false or with reckless disregard of whether it was false or awareness of . . . probable falsity." And the Court continued, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." The Court then acknowledged that "Establishing actual malice is no easy task, because the defamation plaintiff bears the

burden of proof by clear and convincing evidence." Can equal protection exist when a Court acknowledges a bias: "jealously" protecting (emphasis added) the Respondent? It can not.

Can equal protection exist when a Court is permitted to create a hoop that protects the Respondent; through which the Petitioner must jump. A hoop that is all but impossible to reach (Establishing actual malice is no easy task), to say nothing of penetrating? It can not.

What is Libel if it is not the publishing and circulating of false and defaming material about the Petitioner? What portion of equal justice under the law does the Petitioner enjoy when a Respondent is allowed, in fact encouraged, to publish and circulate false and defaming material that destroys the Petitioner's career, reputation, and a lifetime of good works. Was this Petitioner, now without employment, reputation or the means to support his family not injured simply because the Respondent did not commit this act of defamation intentionally? The Court in its August 1, 2001 decision acknowledges that equal justice under law will not be considered.

Within this decision the Court acknowledges that had the Respondent conducted additional research the article would not have been published:

> *"This may be true. However, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."*

Thus encouraging, the Respondent not to "investigate before publishing." Mistakes, falsehoods and errors, unless proven to be a result of a Reckless disregard for the truth,

constitute an acceptable legal standard for the Respondent.

No such latitude is granted to the Petitioner. The Court's decision continues:

> *"The Forbes article may contain false or misleading statements about Carr. The record before us certainly does not prove that Carr is a con-man or a criminal who enriched himself by defrauding bond holders in public-private partnership deals. He well may be an honest businessman who made some mistakes that those seeking to destroy his projects exploited."*

The Fourth District Court concluded that the Petitioner might be an honest businessman who made some mistakes[6] that those seeking to destroy his projects exploited. Having so concluded the Fourth District Court applied the afore referenced Test and ruled that the Petitioner was a public figure.

The Test was both created and is administered

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[6] It should be of interest to the Court to know that the Apache Junction project is running well. Operating revenue, connections and water quality have all exceeded projections. The Southern Connector was constructed under budget and substantially ahead of schedule. The "mistakes" as the court described same in their August 1, 2001 decision turned out to be the figment of the creative writing ability of the Respondent.

exclusively by the Court. All factual determinations regarding the several matters of the Test were made exclusively by the court. That such a process is subjective goes without question. That such a process holds open the potential of mischief is equally without question. That such a process denies the Petitioner Equal Protection under the Law is certain.

Can this or any Court balance the Petitioner, now without employment, reputation or the means to support his family, on the cherished scale of justice, with the Respondent who having profited by his falsehoods, is now forgiven by the court because the Respondent, although untruthful, was only a little less than truthful, was reckless, but only a little reckless? Equal protection under the law. Where, in the visage of the statue of the blindfolded lady holding the book and the balance does this Honorable Court find this decision? Petitioner thinks that it shall not be found.

Therefore, if for no other reason this Petition should be granted because the "equal protection under the law" accorded to the Petitioner by the Fourteenth Amendment was denied by the Court.

IV

There are other compelling reasons to grant this petition. The Court's decision suggests the First Amendment to the Constitution provides an absolute authority where in fact that authority is both limited and coexists with responsibility. The Court speaks to the overwhelmingly important issue of free speech and; in support of its decision, references, from a historical and philosophical perspective, how the "free speech rights (are)

jealously protected by the First Amendment." and that a "free self-governing people must have access to all relevant information," as legal, Constitutional, and historical justification to allow the Respondent's Libel to stand and deny the Petitioners plea for vindication. Yet immunity from being a false witness does not exist legally, Constitutionally or historically. Is there a more repulsive act than the act of patron falsely shouting "fire" in a crowded theater.

In this event the Respondent did not simply shout fire in the Petitioner's theater with a hope to witness the resulting panic, the Respondent made the defamatory declaration with the intent and hope to profit financially by selling more magazines.

The immediacy of the declaration is a factor. The patron who observes a wisp of smoke, should be to a different standard than the patron who perceives an immediate and potentially severe threat. The bonds which the Respondent was warning the readers were not to be placed on the market for several months. There was adequate time for the Respondent to verify the accusations of the article.

This Respondent should not receive immunity from being a false witness. The Respondent, who in this matter sells magazines shouted "Moonshine Man, pass him by." The Respondent, having been told of a wisp of smoke, limited his due diligence to the opponents of the Petitioner, and then shouted "Moonshine Man, pass him by." A simple inquiry with the appropiate authorities would have revealed to the Respondent that the bonds would not even be

marketed for 8 months. The Respondent did not face a relevant publishing deadline. No form of public emergency existed. These was no immediacy to the matter.

If for no other reason this Petition should be granted because the Court failed to apply the full and complete meaning of First Amendment which both establishes the right of free speech and assigns to that right reasonable responsibilities.

V

There are other compelling reasons to grant this petition. In the unlikely event that this Court does not concur with the Petitioners proof that the rights accorded under the Seventh and the Fourteenth Amendments warrant the granting of this Writ Of Certiorari; the Petitioner respectfully requests that this Court grant the Petition because contrary to the findings of both the District and the Fourth District Courts, malice was established with clear and convincing evidence.

The decision of the Court concluded with a footnote that:

> *"Forbes also claims that Carr has failed to show actual malice because any potentially defamatory statements in the article are not actionable. Forbes argues that, as mere rhetorical hyperbole and opinion, these statements cannot objectively "be proved false." We need not address this contention because Carr has otherwise failed to demonstrate actual malice by clear and convincing evidence."*

The motive for Respondent defamation and libel is or should be irrelevant. Respondent should no more be protected from accidently destroying the Petitioner with words than the thief should be protected if in robbing the convenience store the clerk is accidently killed.

Merriam-Webster's Dictionary of Law ©1996 defines Malice:

> "as the **intention** (emphasis added) or desire to cause harm to another through an unlawful or wrongful act without justification or excuse."

The Court in the August 1, 2001 opinion stated that: Petitioner (Carr) failed to demonstrate actual malice by clear and convincing evidence. The Respondent stated under oath that describing the Petitioner as being a "Moonshine Man," was describing the Petitioner an individual who engages in criminal activity. There can be no doubt that stating that the Petitioner "smelled money," unless true, would harm Petitioner's reputation. At issue then must be the question of whether or not Respondent made the allegations intentionally. Certainly the several such defamatory allegations could not all of been made by accident. And they were not. In is brief to the Court, the Respondent declared:

> " *Most of the statements of which plaintiff complains are expressions of opinion and rhetorical hyperbole...*"

If, as Respondent contends, the defamatory statements are the opinion of Respondent, then the statements must, by definition, be intentional. An opinion can be nothing if it is not intentional. It is a non-sequitur to describe the

defamation and libel as the "unintentional opinion of the writer." If, the defaming comments are the opinion of the writer, they must be intentional.

Restated, the Respondent argument would thus read:

> "The statements were simply the Respondents opinion that the Petitioner was a criminal and Respondents use of falsehoods was simply to improve the probability that Respondent's reader would agree with that position."

It follows then that the use by the Respondent of a falsehood about the Petitioner in an attempt to prove the Respondent's written and published opinion of the Petitioner meets the definition of Malice.

And, the Respondent in sworn testimony has established that fact for the Court with clear and convincing evidence.

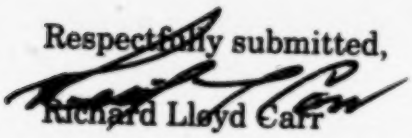
Therefore, if for no other reason this Petition should be granted because Malice was, in fact, acknowledged by the Respondent.

CONCLUSION

The decision of the Fourth District Court of Appeals to affirm the District Courts grant of Summary Judgment denied the Petitioner's Constitutional right to a trial by jury and is a clear abrogation of Petitioners Fourteenth Amendment right of equal protection under the law.

Accordingly, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,



Richard Lloyd Carr

APPENDIX A

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RICHARD LLOYD CARR,
Plaintiff-Appellant,

v.

No. 00-2555

FORBES, INCORPORATED; MATTHEW SCHIFRIN; JOHN DOES,
Defendants-Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Greenville.
G. Ross Anderson, Jr., District Judge.
(CA-99-1967-6-13)

Argued: June 7, 2001

Decided: August 1, 2001

Before LUTTIG, MOTZ, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Luttig and Judge Gregory joined.

COUNSEL

ARGUED: William Marvin Grant, Jr., GRANT & LEATHER-

WOOD, P.A., Greenville, South Carolina, for Appellant. Wallace K.Lightsey, WYCHE, BURGESS, FREEMAN & PARHAM, P.A., Greenville, South Carolina, for Appellees. ON BRIEF: Langdon Cheves, III, GRANT & LEATHERWOOD, P.A., Greenville, South Carolina, for Appellant. Carl F. Muller, WYCHE, BURGESS,

FREEMAN & PARHAM, P.A., Greenville, South Carolina; Tennyson Schad, NORWICK & SCHAD, New York, New York, for Appellees.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Richard Lloyd Carr, an engineer who develops privately financed public infrastructure projects, brought this action asserting that Forbes, Incorporated defamed him by publishing an article casting doubt on the integrity of his conduct and his representations concerning those projects. Because Carr is a limited-purpose public figure who has forecast no evidence that Forbes acted with actual malice in publishing the article, we affirm the district court's grant of summary judgment to Forbes.

I.

Carr has spent his career managing the development of public infrastructure projects; he assembles construction proposals, finds teams of engineers to build such projects, and identifies sources of funding for them. In 1992, an engineering company that Carr owned ran into financial trouble leading to its demise and Carr's personal bankruptcy. Carr then contacted a former employer, the

Dana Larson Roubal Group (DLR), a large national engineering and architectural firm, and convinced DLR to provide seed money to form a new company, Interwest Management, Inc., through which Carr, as President and CEO, could continue managing the development of public infra structure projects with public-private financing methods.

In the early 1990s, Carr contracted to develop a sewer for the town of Quartzsite, Arizona. Carr served as his firm's public representative for the project and maintained a prominent profile in the project's development. The sewer project tapped into local political passions and, in 1993 when the town elected a new mayor who had campaigned against the sewer system, the town canceled construction of the sewer and refused to pay Interwest for the work that the firm hadcompleted. Interwest and the town proceeded to arbitration, resulting in an award in Interwest's favor. After the town refused to honor the award, Interwest sued to recover its fees.

As Interwest was developing the Quartzsite project, officials in Apache Junction, Arizona, who were familiar with Carr's work in Quartzsite, contacted Carr seeking to develop a sewer system for their town. In August of 1991, these officials and Carr's firm signed a contract to build a similar sewer in Apache Junction. Regulators had imposed a building moratorium on Apache Junction, the largest town in the United States without a sewer, because of its

inadequate sewage disposal system; yet, local voters had twice voted against the tax increases necessary to finance such a system. Carr proposed that the town form a private sewer district that could operate the sewer by collecting fees and thereby avoid new taxes. After Carr arranged to create a sewer district, that district hired Interwest to build and manage the project and financed it through the issuance of bonds, all of which the Allstate Insurance Company, Inc. purchased. However, Interwest had apparently relied on unreasonably optimistic projections and an erroneous database of potential customers. Due to a lack of customers, the sewer district was unable to pay off its bonds and ultimately filed for bankruptcy. Allstate then sued all members of the Interwest team for fraud.

In July 1995, as the Apache Junction sewer project neared completion, South Carolina officials solicited bids to build the Southern Connector, a highway intended to connect I-85 with I-385 in Greenville County, South Carolina. Carr and Interwest arranged that a new corporation, Interwest Carolina, LLP, be formed to bid for the contract to build this highway. Carr had no ownership stake in Interwest Carolina, which, like Interwest, was controlled by DLR. The record does not reveal whether Carr was an officer in Interwest Carolina, but indisputably he continued to serve as President and CEO of Interwest itself. Bob Farris, a former Federal Highway Administration Commissioner, was the "public face" of Interwest Carolina. Carr served as the project's manager and behind-the-scenes facilitator and shared with Farris joint authority for the project. After a

competitive bidding process in March of 1996, South Carolina selected Interwest Carolina to complete the Southern Connector project. Among the many firms Carr drew together to form the Interwest Carolina team was Wilbur Smith Associates.

Controversy immediately ensued over the highway project. Indeed, its opponents brought suit, contending that the project required a local referendum, a position the South Carolina Supreme Court ultimately rejected. When word of the Allstate lawsuit against Interwest reached South Carolina, state officials developed concerns as to the competency and honesty of Interwest Carolina. The Allstate suit became the topic of local news coverage and local officials investigated the allegations in that suit to determine whether Interwest Carolina should continue on the project. South Carolina officials decided to take no action and Interwest Carolina continued its work on the Southern Connector.

In its July 7, 1997 edition, Forbes magazine printed an article entitled "Moonshine Bonds" that was centered on Carr. The article suggested that Carr was a shady businessman with a troubled history. The article criticized Carr throughout. For example, it alleged that Carr "smelled money" in public-private financing, that he "exploited" the tax law, and that he sought to target a larger federal funding program as "bigger game" which was "right on [his] turf." In the table of contents, the magazine referred to Carr

as the "Moonshine Man." Forbes noted Carr's personal bankruptcy, the failure of his prior business, and that he had once hired a convicted felon who had served time in connection with an insurance fraud scheme. The article alluded to the Quartzsite project -- stating that it "ended in a legal mess" - and focused on Carr's involvement with the Apache Junction and Southern Connector projects.

Based on the allegations in the Allstate suit, "Moonshine Bonds" charged Carr with personally defrauding Allstate and the town of Apache Junction.[7] The article explained that the Apache Junction sewer district had "busted" because "the feasibility study done by Carr's company had grossly overstated the number of residents who would sign up for sewage connections." Although the magazine noted that "Carr has an explanation for all his failures," specifically the failure" of Apache Junction, it suggested that any explanation was false by highlighting the fact that Carr's "company drew $1.5 million in project management fees" from the project.

"Moonshine Bonds" further stated that, while Apache Junction residents were "nursing their wounds," Carr had"moved on" and was now "pushing yet another" project, the Southern Connector. The article claimed that Carr's

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[7] The Allstate suit settled after publication of the Forbes article for over nine million dollars, of which Interwest paid Allstate $1.25 million.

firm was awarded the Southern Connector contract because it had secured a study by Wilbur Smith Associates, which "project[ed] traffic and toll revenues 50% higher" than a previous study conducted by that same firm. Forbes implied that, like the Arizona project, the South Carolina project would fail because it was based on a fraudulent feasibility study. The article noted that Carr had now "set his sights on even bigger game" because he intended to participate in a new federal financing program. It concluded with the statement: "Count on one thing: Those bond sellers [for the Southern Connector] won't be calling on Allstate to unload the Carolina bonds"and recommended that readers "take a pass" on the Southern Connector bonds.

The author of "Moonshine Bonds," Matthew Schifrin, began work on the article after a bond "watchdog," Richard Lehman, alerted him to the potential story. Lehman put Schifrin in touch with George Price, a South Carolina activist working to defeat the Southern Connector. Price provided Schifrin with a notebook of material that he had collected about the project. Schifrin subsequently conducted independent research. In addition to speaking with Price and Lehman, he talked with several other sources, including an Allstate attorney involved in the lawsuit, a financier, a local Arizona town official, and Carr, himself. Schifrin also examined relevant documents including the complaint in the Allstate action and project proposals relevant to the Southern Connector. A Forbes employee fact-checked Schifrin's article and verified all of its material facts.

Soon after the Forbes company published "Moonshine Bonds," DLR, believing Carr to be a public relations problem and no longer"marketable," terminated his employment with Interwest.

Carr subsequently brought this defamation suit in June 1999 against Forbes, Schifrin, and several John Does (hereafter, collectively "Forbes"). The district court granted Forbes summary judgment, reasoning that Carr was a limited-purpose public figure who could not prove by clear and convincing evidence that Forbes had acted with actual malice. Carr now appeals.

II.

We first consider whether Carr is a public figure. If so, the First Amendment, as authoritatively interpreted by the Supreme Court, requires that he bear a substantial burden of proof in this defamation action.

The Court has long recognized that defamation claims potentially chill the free speech rights jealously protected by the First Amendment. Were speakers threatened with potential liability every time they wished to criticize, they would hesitate to provide the public with many important facts and ideas. A free self-governing people must have access to all relevant information -- both the laudatory and the critical -- when choosing a course of public policy. For this reason, the Court has held that a public figure -- a

person essentially part of the public debate -- may only recover damages"for a defamatory falsehood relating to his official conduct [if] he proves that the statement was made with `actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

Moreover, a person need not be a public figure in all respects to trigger the actual malice standard. The Supreme Court has also held that, in certain circumstances, the Constitution treats private citizens who are not otherwise public figures as public figures for the purpose of comment upon certain issues. See Hutchinson v. Proxmire, 443 U.S. 111, 134 (1979); Wolston v. Reader's Digest Assoc., 443 U.S. 157, 164-68 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). When a person thrusts himself into the forefront of public debate, he is treated as a "limited-purpose public figure" for purposes of comment on issues arising from that debate. Such "limited-purpose public figures," like other public figures, may only recover for defamatory statements made with actual malice. Forbes contends, and the district court held, that Carr is such a limited-purpose public figure with respect to the issues discussed in "Moonshine Bonds."

Whether a person has achieved the status of a limited-purpose public figure is a question of law, which we consider de novo. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1551 (4th Cir. 1994). In answering that question,

we conduct a two-part inquiry. First, we ascertain whether a public controversy gave rise to the defamatory statement. Second, we determine whether the plaintiff's participation in that controversy sufficed to establish him as a public figure within the context of that public controversy. Id. at 1553. The defendant bears the burden of proving the plaintiff's public figure status.

A.

Determining whether a public controversy gave rise to the article at issue in this case requires review of the scope of the alleged defamatory statements and the facts surrounding them. A"public controversy" does not encompass every conceivable issue of interest to the public. Time, 424 U.S. at 454. Rather, "public controversy" is a legal term of art; the term only encompasses a dispute"that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." Foretich, 37 F.3d at 1554.

The Forbes article primarily addresses the financing and construction of the Apache Junction sewer and the Southern Connector highway. On one hand, Carr argues that neither of these subjects gave rise to a public controversy; he maintains that the article comments only upon isolated "local issues" that had no "ramifications for nonparticipants." On the other hand, Forbes contends that the article describesa broad ranging, important public

controversy over public-private financing deals with "nationwide implications."

Neither formulation is wholly accurate. The record clearly demonstrates that the Arizona and South Carolina projects engendered local controversies, but that these controversies do constitute parts of a greater, more general public controversy. One need not, however, inflate this public controversy, as Forbes would, into its most general and amorphous form -- public-private financing as a general matter-- to capture its significance. Rather, most accurately, the facts before us demonstrate a public controversy over the soundness of privately financed public projects of Carr's Interwest companies, as exemplified by the Apache Junction sewer and Southern Connector highway.

Unquestionably, public attention focused on the legitimacy of the projects described in "Moonshine Bonds." The Apache Junction project received significant publicity in the Arizona community and media both at the time that Interwest developed the project and after its completion. The press also published articles concerning the litigation arising out of the Apache Junction project. Similarly, the local community in South Carolina discussed and debated the Southern Connector. Furthermore, after word of the Apache Junction lawsuit against Interwest reached South Carolina, a public debate ensued over whether the facts alleged in the suit indicated that Interwest Carolina's

participation in the Southern Connector would result in similar problems. Indeed, the suit led South Carolina authorities to investigate Interwest Carolina to determine whether its contract to build the Southern Connector should be canceled.

The fact that the controversy addressed by Forbes stirred public debate may be enough to satisfy the requirement that a true public controversy gave rise to the publication. See Foretich, 37 F.3d at 1555 (that child custody dispute stirred "public discussion" of child-abuse and civil contempt was enough to create public controversy affecting the public). In addition, however, Carr's conduct in developing public works projects had a concrete impact on the lives of people outside the controversy. Public projects, by definition, exist for the public at large. When public projects are mismanaged and bonds issued to finance those projects fail, those projects may in turn fail, thereby harming the public. The citizens of Apache Junction, Arizona now live in a town with a mismanaged, over-built sewage system that was forced to the brink of bankruptcy. The citizens of South Carolina --and indeed all travelers who might use the Southern Connector --would likewise suffer were the bonds financing that project to fail.

In sum, "Moonshine Bonds" addressed a public controversy.

B.

We next ask whether Carr's participation in this controversy is sufficient to justify treating him as a limited-purpose public figure for purpose of comment upon it. To "become[ ] a public figure for a limited range of issues," one must "voluntarily inject[ ] himself or [be]drawn into a particular public controversy." Gertz, 418 U.S. at 351.

Therefore, a limited-purpose public figure is essentially one who has assumed a "role of public prominence in the broad question of concern." Hutchinson, 443 U.S. at 135.

We have devised a five-factor test to determine whether the plaintiff has thrust himself into a controversy to the extent necessary to trigger limited-purpose public figure status. We consider whether (1) the plaintiff has access to channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the controversy, (3) the plaintiff sought to influence the resolution of the controversy, (4) the controversy existed prior to the publication of the defamatory statements, and (5) the plaintiff retained public figure status at the time of the alleged defamation. See Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982). In this case, review of these five factors requires the conclusion that Carr has taken the affirmative steps necessary to inject himself into the controversy surrounding the soundness of his bond-financed public projects and therefore to become a limited-

purpose public figure.

The heart of our five-factor test is the second and third factors, which we have sometimes combined into the question of "whether the plaintiff has voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy." Reuber v. Food Chem. News, Inc. , 925 F.2d 703, 709 (4th Cir. 1991) (en banc). One does not become a limited-purpose public figure merely by contracting with the government or accepting public money, see Hutchinson, 443 U.S. at 135, but one who contracts with the government can become such a public figure because of the way in which he conducts himself in connection with those public contracts. See, e.g., McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985) (architect who built public works became limited-purpose public figure through his acts in conjunction with those projects). In this case, Carr did not merely contract with the government; he personally and affirmatively took actions that invited public attention in connection with public contracts.

Although Carr did not own Interwest, the company was his brain-child and he served as the company's President and chief executive. In this position, he was, for all intents and purposes, solely in charge of the company's activities. He hired almost all of its employees, selected its projects, planned its operations, and put together its deals. Carr decided if and how Interwest would develop the Quartzsite

and Apache Junction projects and played a critical role in forming Interwest Carolina and supervising its development of the Southern Connector project.

Of course, "activity likely to engender publicity, even criminal activity, does not equate to taking on a role of special prominence in a public controversy." Wells v. Liddy, 186 F.3d 505, 536 (4th Cir. 1999). Carr, however, did far more than the plaintiffs in Wolston, 443 U.S. at 167 (suspected spy not a public figure when he "never discussed this matter with the press and limited his involvement to that necessary to defend himself against the contempt charge"), or Gertz,418 U.S. at 352 (defense counsel in civil case not a public figure in controversy arising from related criminal case when he "took no part in the criminal prosecution" and "never discussed either the criminal or civil litigation with the press and was never quoted as having done so"). Carr, unlike Wolston and Gertz, voluntarily injected himself into the public debate by "attempt[ing] to influence the merits of [the] controversy." Wells, 186 F.3d at 537.

For example, in Apache Junction, Carr selected the team that would build the sewer project. He also chose the project's financiers, and therefore played a role in the sale of the bonds financing the project. Rather than being "dragged unwillingly into the controversy," Wolston, 433 U.S. at 166, Carr voluntarily assumed a prominent public presence: he attended public meetings, spoke out in favor of

the sewer project, wrote editorials for the local press, and was quoted in the local media, all in an effort "to engender public support" for the project. See Fitzgerald, 691 F.2d at 668 (promotional efforts for public venture through which plaintiff seeks pecuniary gain can be attempt to influence controversy).

Although the parties dispute the character of Carr's activity in South Carolina, it is uncontroverted that, at least behind the scenes, he managed the Southern Connector project in much the same way as he had managed the Apache Junction project. As the Senior Program Manager of Interwest Carolina, Carr was, according to the company's project proposal, a "key principal." Carr played a dominant role in building the Interwest Carolina team and creating the bid for the project.

In so acting, Carr negotiated with South Carolina public officials. He also was instrumental in hiring Wilbur Smith to conduct thestudies upon which Interwest Carolina's bid was based. If not the only force behind the project in South Carolina, Carr was clearly a strong and influential one.

In sum, instead of "play[ing] only a minor role" in the public controversy that gave rise to the assertedly defamatory statements, Wolston, 443 U.S. at 167, Carr directed Interwest and managed all of the projects discussed in "Moonshine Bonds." See Reuber, 925 F.2d at 709 (prominence in a professional field may be sufficient to

satisfy factors two and three). If those projects were based upon fraudulent estimates and studies (and we express no view on this), some of the responsibility rests with Carr. His acts created much of the controversy discussed in the article, and he voluntarily injected himself into much of the public imbroglio surrounding these projects.

Carr also satisfies the other three prongs of our five-factor test. The record before us demonstrates that Carr had access to channels of effective communication to rebut the allegations in the Forbes article. Indisputably, Carr's Interwest projects received substantial attention in the press. See Reuber, 925 F.3d at 708 (past publications concerning professional work of plaintiff is evidence of access to channels of effective communication). Moreover, Carr has often been quoted in media reports involving his Arizona projects, demonstrating his ability to obtain press coverage as to his views of the projects. Similarly, the South Carolina press quoted Interwest Carolina officials on the Southern Connector project and Interwest's connection to the Arizona projects. Although Carr himself was never quoted with respect to the South Carolina projects, he was a leader of the entity from which the media solicited quotes. Undoubtedly, the press would have reported Carr's views, over those of lesser officials, if he had made himself available.[8]

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[8] Of course, the Arizona and South Carolina media do not have the international readership of Forbes magazine.

The remaining two prongs of our test are also easily satisfied. The controversy over Carr's projects clearly existed before the report in "Moonshine Bonds." Indeed, well before dissemination of that article, Allstate had sued Interwest for fraud, and that suit had received the attention of the press. Similarly, prior to the airing of "Moonshine Bonds," the advisability of the Southern Connector was publicly debated. Before the article was published, Allstate's suit against Interwest spurred South Carolina authorities to investigate Interwest, which in turn prompted media reports on that investigation. Finally, Carr also certainly maintained his public figure status at the time of the alleged defamation. When Forbes published "Moonshine Bonds" in July 1997, the Allstate suit was still pending and the Southern Connector project was ongoing. Therefore, we conclude that all five factors have been met, and that Carr's participation in the controversy surrounding the financial soundness of the Interwest

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However, a court does not ask whether a defamation plaintiff has ever had access to a media outlet with the same size readership of the allegedly defamatory publication; such an inquiry would effectively prohibit widely read publications from ever commenting on local controversies. Our inquiry is rather whether the evidence demonstrates that the defamation plaintiff had access to channels of effective communication to respond to the allegedly defamatory statements. Carr clearly had such access.

companies' public projects sufficed to justify treating Carr as a limited-purpose public figure for purpose of comments arising out of that controversy.

III.

Because Carr is a limited-purpose public figure, he can only recover in defamation if Forbes acted with actual malice in publishing "Moonshine Bonds." Proof of falsity is not enough; Carr must also demonstrate that Forbes "made the [false] statement with knowledge that it was false or with reckless disregard of whether it was false or not." Reuber, 925 F.3d at 714 (quoting New York Times, 376 U.S. at 280). Reckless disregard means "publishing with a high degree of awareness of . . . probable falsity." Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). Establishing actual malice is no easy task, because the defamation plaintiff bears the burden of proof by clear and convincing evidence.[9]

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[9] Although acknowledging that the Supreme Court has denied statements of "opinion" blanket constitutional protection, see Milkovich v.Lorain Journal Co., 497 U.S. 1, 21 (1990), Forbes also claims that Carr has failed to show actual malice because any potentially defamatory statements in the article are not actionable. Forbes argues that, as mere rhetorical hyperbole and opinion, these statements cannot objectively "be proved false." We need not address this contention because Carr has otherwise failed to demonstrate actual malice by clear and convincing evidence.

As an appellate court reviewing an order granting summary judgement, we must independently review the record to determine whether Carr has forecast evidence sufficient to prove actual malice by clear and convincing evidence. See Bose Corp. v. Consumer's Union, Inc., 466 U.S. 485, 514 (1984). Even assuming that at least some of the information in "Moonshine Bonds" is false, Carr cannot prevail because he has not forecast clear and convincing evidence that Forbes actually knew, or had a high degree of awareness of, the probable falsity of anything in the article. Indeed, the record contains uncontroverted evidence that the Forbes reporter, Matthew Schifrin, conducted extensive research before he wrote the Forbes article. None of the material Schifrin collected put him on notice that any of the information in the article was false. Among other sources, Schifrin spoke with an Allstate attorney involved in the suit against Interwest, a public bond expert with a good reputation, a local activist opposed to the Southern Connector, and Carr himself. Schifrin also personally reviewed documents involved in the Southern Connector project, including Interwest Carolina's proposal. Moreover, a Forbes employee meticulously fact-checked Schifrin's article. The fact checker's notes reveal that at least one source verified every statement in the article. In the face of this careful research, Carr does not point us to anything that should have put Forbes on notice as to the falsity of any statement in "Moonshine Bonds."

Carr essentially complains that Forbes should have investigated further before it published "Moonshine Bonds."

According to Carr," accepted standards of journalism" require this. Carr contends that, if these standards had been followed, Forbes would have learned that the article was altogether false. This may be true. However, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St.Amant v. Thompson, 390 U.S. 727, 731 (1968)."There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id.(emphasis added). Carr also contends that an anonymous editor added the article's most inflammatory statements without any knowledge of the facts. A review of the article from Schifrin's first draft, through the editing process, to the final draft, reveals that the language of the article did become more spirited and critical of Carr as editing progressed. However, Carr certainly has not pointed to any evidence that would prove clearly and convincingly that an editor made these changes out of whole cloth without consulting Schifrin's research. Indeed, it is undisputed that the fact-checker independently verified every fact in the final published version.

The Forbes article may contain false or misleading statements about Carr. The record before us certainly does not prove that Carr is a con-man or a criminal who enriched himself by defrauding bondholders in public-private partnership deals. He well may be an honest businessman who made some mistakes that those seeking to destroy his projects exploited. However, the First Amendment does not

require perfection from the news media. Were the press subject to suit every time it erred, it would decline to speak out without resorting to the sort of cumbersome due diligence common in security offerings. For this reason, the Constitution provides the press with a shield whereby it may be wrong when commenting on acts of a public figure, as long as it is not intentionally or recklessly so.

IV.

For all of these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Richard Lloyd Carr,	C/A No. 8:99-1987-13
Plaintiff,	ORDER
vs.	Granting Defendants' Motion for Summary Judgment
Forbes, Inc., Matthew Schifrin, and John Does I-X,	AND
Defendants,	Denying Plaintiff's Motion to Seal Order Pending Appeal

INTRODUCTION

This matter came before this Court for hearing on Thursday, September 28, 2000, on Defendants' Motion for Summary Judgment and on Plaintiff's Motion for Partial Summary Judgment. Defendants were represented at the hearing by Wallace K. Lightsey and Carl F. Muller of the law firm Wyche, Burgess, Freeman & Parham, P.A., and by Tennyson Schad, of the law firm Norwick & Schad. Plaintiff was represented at the hearing by William M. Grant, J r., and Langdon Cheves of the law firm Grant & Leatherwood, P.A.

After carefully reviewing and considering the pleadings, memoranda, affidavits, exhibits, and depositions on file with the Court, and after hearing arguments of counsel, I have decided to deny Plaintiff's Motion for Partial Summary Judgment and grant Defendants' Motion for Summary Judgment, because I have concluded that Plaintiff is a public figure as a matter of law. Based on this legal determination, the burden of proving actual malice is on Plaintiff. To avoid summary judgment, Plaintiff must demonstrate that he can present evidence at trial that would support a jury finding that there is clear and convincing proof of actual malice, Plaintiff has failed to come forward with any evidence of actual malice, much less sufficient evidence to overcome his burden. Accordingly, summary judgment is appropriate in favor of Defendants on

the public figure issue.[10]

Subsequent to my decision to grant Defendants' Motion for Summary Judgment, Plaintiff filed a Motion to Seal Order Pending Appeal. However, Plaintiff has failed to meet his burden of establishing any legitimate basis for which to seal this Court's order from all public view, especially in light of the fact that all other pleadings and evidence in this case are available to the public. Therefore, I deny the Plaintiff's Motion to Seal Order Pending Appeal.

1. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

There is no genuine dispute as to the facts material to the

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[10] The Court's ruling granting summary judgment in favor of Defendants is based on a determination that Plaintiff is a public figure and cannot moot his burden of proving actual malice. Therefore, there is no reason to reach the other issues presented by Defendants in their Motiong for Summary Judgment. Accordingly, this order does not reflect in any way on the merits of any of Defendants' other grounds upon which summary judgment was sought, such as whether or not statements in the article were statements of opinion or rhetorical hyperbole that are not actionable; whether or not the factual statements of and concerning Plaintiff contained in the article were substantially true; whether or not Plaintiff's claims should be dismissed because they ware filed after the statute of limitations had run; or whether or not Plaintiff's cause of action for civil conspiracy should be dismissed for failure to allege or present evidence of a viable claim for conspiracy.

determination of this issue. Plaintiff, Richard Carr, is a citizen and resident of the state. of Arizona, where he has lived for the past 23 years. An engineer by education, Carr founded Interwest Management, Inc., ("Interwest") in 1991 to promote construction projects for various governmental and quasi-governmental entities utilizing public-private partnerships to obtain financing for and to undertake construction of the projects. In exchange for undertaking the management of a particular project and putting the deal together, Carr or his employer would receive a fee. Most if not ail of these projects have involved the actual or proposed construction of public works for public authorities.

Just prior to establishing Interwest, Carr was Involved with a company called Westrends: Carr sought to persuade the small town of Quartzsite, located in southwest Arizona, to contract with Westrends to develop a prison project. Carr met frequently with public officials, public employees, and members of the public to attempt to persuade the town to hire his company to carry out all aspects of the project, including the financing. There was considerable local opposition to the prison project, and Carr eventually stopped promoting it.

In 1991, Carr organized another company, Interwest Management, Inc., which was wholly owned by Carr's former employer, an engineering firm known as debt to DLR during most of its existence.

After organizing Interwest, Carr returned to Quartzsite to promote the idea of hiring Interwest to develop a sewer system for the town. As he had done with the prison project, Carr spoke at numerous public meetings to promote the sewer project. Although Interwest obtained a contract for the development of the sewer system, the Mayor of Quartzsite terminated the contract after deciding that it created too great a financial burden for the town. Throughout that process, the proposal "aroused considerable public controversy (and Carr] was the leader and spokesman for the sewer project, the same as for the prison project."[11] a The local newspaper published numerous articles about the projects, many of which featured Carr. In fact, the editor of the newspaper states in his affidavit;

> *"Carr took the lead role for his companies on these projects, serving as their face to the media and the public. Both projects involved requests by Mr. Carr for the expenditure of public funds and for the undertaking of binding contracts by public bodies, Both stirred considerable public controversy and political debate . . . . At times Mr, Carr would contact*
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> *me or my staff and seek to influence coverage by The Gem of his proposals. Mr. Carr was*

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11 Affidavit of Rex B. Byrd P3,

unquestionably a public figure."[12]

In addition to the many and varied news articles concerning Carr and the sewer project in Quartzsite, Carr actively sought out public attention by writing to the newspaper and publishing "guest editorials" to garner support for and counter opposition to the sewer project. When the contract was terminated, Interwest sued the town and the financial advisor that had been involved with the deal. The litigation led to an arbitration and rnultiple trials and appeals, and now years later the case is still pending in the Arizona courts.

In the meantime, the former Town Attorney of Quartzsite went to work in another small city, Apache Junction, located on the outskirts of Phoenix. He and the Apache Junction Chamber of Commerce invited Carr to talk about the construction of a sewer system for Apache Junction, and Carr promoted the idea to city officials, The citizens of Apache Junction had voted down two previous attempts to build a sewer system using tax dollars, but Carr persuaded the City Council that the project could be financed by having a non-profit association issue tax-exempt bonds. In doing so, "Carr . . . frequently appeared in public and at official meetings to represent Interwest and speak about the

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[12] Affidavit of Jim Loyd P2, P4, P5; see also newspaper articles attached to Mr. Loyd's affidavit.

project."[13]

Interwest obtained a contract to develop the sewer system for Apache Junction. A non-profit sewer district was organized to issue approximately $32 million of bonds, which were underwritten by the investment banking firm of Mesirow Financial, Inc., and purchased by Allstate Insurance Company. The system was constructed and went into operation in late 1995. Interwest received a fee of about $1 .4 million from the deal.

II

Approximately one year later, the sewer district was bankrupt, the bonds were in default, and there was evidence that Interwest had fraudulently inflated the projected revenues of the system in order to help sell the bonds. The manager of the system describes in his affidavit:

> *"When the District mailed the first set of bills to the list of customers supplied to it by Interwest, only half of the bills resulted in*

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[13] Affidavit of Det. Sgt. Troy Mullender P2; accord Affidavit of Tony Vehon P8; Affidavit of Edward Grabek P13; Affidavit of Kathleen Connally and attachments thereto.

payments. Many of the bills were returned to the District by the United States Postal Service marked "Undeliverable." When we sent the next set of bills, the same thing happened. We quickly investigated the matter and discovered that many of the addresses did not exist and were assigned to vacant I [also] found that Interwest had included numerous customers in their 1995 financial projection even though the already completed design of the sewer system (1994) showed that the area would not be sewered. In another case I found that Interwest projected approximately 790 multi-family customers paying for services at start-up of the District when the two parcels of property were actual vacant land with no serious plans underway for multi-family development. Interwest even included the non-existent multi-family housing units as paying customers in their financial disclosure reports to the bondholder many months after operations began."[14]

The sewer district filed suit against Interwest alleging fraud, and Allstate followed suit shortly thereafter, alleging securities fraud, common law fraud, and related causes of action. Allstate's lawsuit recently settled "for a considerable

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[14] Affidavit of Edward Grabek P4, P9 (emphasis added).

sum of money[15] reported to be over $9,300,000.[16] Of the approximately $1.4 million received by Interwest and its parent company DLR Group, Inc.. on the Apache Of the approximately $1,400,000 received by Interwest and its parent company DLR Group, Inc., on the Apache Junction sewer project, Interwest and DLR paid $1.25 million as part of the settlement.[17] In the meantime, the local police and the Phoenix bureau of the FBI investigations of fraud, forgery and bribery involving Carr and Interwest, although ultimately, no one was prosecuted. The financial problems of the sewer district. The financial problems of the sewer district, the bond default, the lawsuits, and the criminal investigations "generated enormous publicity in the Apache Junction and Phoenix area concerning the project, Mr. Carr and Interwest.[18]

Around the same time it was setting up the Apache Junction deal, Interwest was also putting together a team to submit a proposal to construct the Southern Connector, in Greenville County, South Carolina, with financing from tax-exempt bonds issued by a non-profit 'association. In January 1996, the South Carolina Department of

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15 Affidavit of Edward Grabek P12.

16 "Sewer Proponents Out $9 Million in Suits," The Arizona Republic (Sept. 2, 2000)

17 Id

18 Affidavit of Tony Vehon P7

Transportation received three competing proposals for the project one from the Interwest group, one from Fluor Daniel, and one from Perini, HarbertYeargin (a joint venture between the Perini Corporation and Harbert-Yeargin, a Greenville engineering firm). On February 29, 1996, the DOT decided to go forward with contract negotiations with Interwest,

Shortly thereafter, Jack Rizzo, Vice President of the Perini Corporation, sent a formal letter of protest to the South Carolina Department of Transportation, protesting the DOT's decision. In particular, Mr, Rizzo voiced a strong complaint about the fact that Interwest had used the firm of Wilbur Smith Associates to prepare a new traffic and feasibility study as the basis of tnterwest's financial model for the project. Wilbur Smith had prepared a similar study in 1994 as part of the DOT's preliminary evaluation of the project. The 1994 study had been provided by the DOT to all three companies submitting proposals on the project. However, after joining Interwest's te m, Wilbur Smith prepared a new traffic study in 1995 that increased the toll revenue schedule by 5096 aver the original study prepared just one year earlier. As Mr. Rizzo stated in his letter of protest:

> *"The basis of our revenue projections, as stated in our proposal, was the October 1994 "Preliminary Feasibility Study for the Greenville Southern Connector" prepared by Wilbur Smith Associates for Florence & Hutcheson, Inc., and provided by SCOOT . . . .*

A more serious concern in this area is the increased toll revenue schedule proposed by Interwest Carolina, for whom Wilbur Smith Associates served as traffic engineer. What has happened in the area since 1994 to warrant a 50% increase in the recommended tolls for the project? Was the first study which was provided to all proposers not prepared carefully? Has Wilbur Smith Associates prepared a study to support the project costs? This issue also highlights the difficulties involved when consultants which have been so closely involved with the preparation and analysis of the preliminary materials, provided to all proposers as a common reference, are also allowed to participate in the preparation of final proposals, Many municipalities and agencies have chosen to restrict later involvement of these parties."[19]

The South Carolina DOT nevertheless proceeded to negotiate with Interwest over the details of the project. Carr was the primary representative for the Interwest group in the communications and negotiations with South Carolina DOT officials. Those negotiations were still underway in January 1997 when Allstate sued Interwest in Arizona alleging fraud in the Apache Junction deal. That lawsuit received extensive publicity in Arizona and in South

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[19] Letter of Mar 11, 1 998, from John R. Rizzo to Betty Mabry and Larry C. Duke (Exhibit A-7 to Affidavit of George W. Price).

Carolina, and Carr figured prominently in the news reports. On April 9, 1997, a weekly newspaper published in Phoenix, the New Times, published a lengthy, detailed report about Carr, the allegations over the Apache Junction project, and other questions about Carr's past. This article, entitled "Carr Wrecks," reported among other things that:

(5) "Richard Carr, president of a firm that wants to build the $350 million South Mountain Toll Road [in Arizona], has extensive experience in 'public-private partnerships.' Unfortunately, most of those experiences have been bad."

(6) "Carr has shown a knack for recognizing needs, ginning up demand and selling himself as the path to progress - often in obscure, politically unsophisticated burgs. He sold Apache Junction a sewer system. He tried to sell Quartzsite a sewer and a prison, but Quartzsite only bought the sewer. The City of Douglas was poised to let Carr build a private prison, but city fathers got spooked and backed away."

(7) "The (Arizona] toll-road project isn't the first 'public-private partnership' Carr has attempted, and his track record to date has been anything but sterling. In fact, nearly everywhere he treads, Richard Carr seems to leave a wake of litigation, political intrigue, bankruptcy and dubious characters."

(8) "A year after Apache Junction's $32 million sewer system became functional, the special district that

Carr organized to build it has declared bankruptcy. Claims of fraud, forgery and lawsuits are flowing like, well, wastewater, And the FBI is poking around."

(9) "Carr convinced the town of Quartzaite to build a sewer system. The project helped polarize the community and spawn a thicket of lawsuits."

(10) [If] Carr can reel in just one toll-road project, he stands to make a lot of money, regardless of that road's viability. Carr would get a good chunk of his money up-front, simply for putting the deal together. , . 'That's where the scam can come in," warns C Richard Lehmann, who tracks bond defaults for the Bond Investors Association, a nonprofit industry watchdog group based in Miami, Florida. Lehmann says Carr's method - creating a special district to issue bonds - has proved a recipe for disaster in the past. 'You set these things up, and no one's left minding the store,' Lehmann says. 'And since there's no equity the bondholders take the loss.'"

It is undisputed that Carr never sued the author or publisher of the "Cart Wrecks" article. Not long after "Cart Wrecks" was published, Phoenix's daily newspaper, The Arizona Republic, reported that Carr was being removed from a toll road project that Interwest was pursuing with

the Arizona Department of Transportation.[20] Carr had been acting as the "primary contact person for Interwest in its dealing with the ADOT," including the representation of Interwest at public meetings on that project.[21] On May 21, 1997, Interwest sent a letter to the Arizona DOT stating that Carr had been replaced by Robert Parris as president, that Interwest's Phoenix office was being closed, and that Carr would no longer be involved in the Arizona toll road project.

The "Cart Wrecks" article quoted Richard Lehmann, a national expert on bond scams and defaults, to the effect that financing like that used in the Apache Junction project has great potential for abuse, in that the promoters take big fees for themselves but then the projects cannot generate sufficient revenue to carry the debt service on the bonds. When Lehmann learned that Carr was pursuing a similar deal on the Southern Connector, he contacted Forbes reporter Matt Schifrin, whom he considered a very good reporter from previous articles that Schifrin had done on the subject of tax-free bonds, to suggest that Schifrin look into doing an article on this project.

After a preliminary investigation, Schifrin decided to go ahead with the article. He spent several weeks researching

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20 Toll Road Point Man Off Project," The Arizona Republic B'! (June 4, 1997).

21 Affidavit of William J. Hayden P5, P8.

and writing the article, eventually entitled "Moonshine Bonds," which is the subject of this lawsuit. He first obtained relevant background information and documentation, and then he began calling people for interviews. He interviewed Carr twice, once at great length. He also spoke with other members of the Interwest group involved in the Southern Connector project, including one of the underwriters and a financial advisor working with Interwest on the project. He interviewed city officials in Apache Junction and the attorney for Allstate, and he obtained and reviewed documentation about the Apache Junction bond offering, the default on those bonds, and the resulting bankruptcy and fraud lawsuits that were filed in Arizona, including the bond offering memorandum, the bankruptcy filing by the sewer district, and the Allstate complaint.

Schifrin also got in touch with George Price, a local resident opposed to the Southern Connector, who sent Schifrin a detailed memorandum on the background of the Southern Connector. Along with the memorandum, Price sent Schifrin a thick binder containing extensive documentation, including the two feasibility studies prepared by Wilbur Smith Associates; Interwest's proposal for constructing the Southern Connector; the South Carolina DOT's evaluation of the three competing proposals; the letter of protest from Perini, Harbert-Yeargin; internal Interwest documents; newspaper reports of Carr's troubles in Arizona; and a number of news reports and other documents concerning the Southern Connector.

After Mr. Schifrin finished writing the article, it was independently reviewed and checked for factual accuracy by Forbes employee Steve Johnson. Mr. Johnson spoke twice with Mr. Carr, who confirmed many of the facts reported in the article, Johnson also interviewed other sources, reviewed documents given to him by Matt Schifrin, and obtained additional documents concerning Interwest's proposal on the Southern Connector project.

On June 18, 1997, Forbes published "Moonshine Bonds." Most of the article concerns Carr's background in Arizona and in particular the substantial problems and serious allegations that had arisen from the Apache Junction sewer project. Five of the article's twenty paragraphs deal with the Southern Connector. As stated by the article's author, his intent was to raise questions as to whether the bonds that were to be issued to finance the Southern Connector were a sound investment, in light of the woeful record of financial results of prior projects, Carr's checkered history, and the fact that allegations similar to those from Apache Junction had arisen in connection with the Southern Connector.

However, by June 1, 1997, before the publication of the Forbes article, Carr had already been the subject of wide publicity on the issue of public-private partnerships in a variety of publications throughout Arizona and other parts of the country. At the motion hearing, Plaintiff's counsel represented to the Court that these articles were published

after the Forbes article. The Court's review of the record, however, demonstrates that this representation is simply untrue. In the evidence provided in support of Defendants' Motion for Summary Judgment alone, there are over 400 specific references to the Plaintiff in literally dozens of articles, ail publlished before the Forbes article. to at least ten different publications in Arizona, South Carolina, and Washington.

Plaintiff also argues that the news stories were simply his responses to unwanted attention. Again, the evidence before the Court belies this claim. The record demonstrates that Carr had repeatedly and aggressively sought public attention, not only through the media, but also through appearances before public meetings and in meetings and negotiations with governments(bodies and officials. Public works projects are Carr's stock and trade, and politics and public debate are centrally entwined with the services that he and Interwest promoted, Many of the projects in which Carr has been involved over the last two decades have been funded at least in part by public money, and all have required some form of public or governmental approval. Carr has time and again voluntarily appeared at public meetings to promote his companies for public projects, and he has written numerous editorials and otherwise used the press extensively to promote his agenda.

With regard to this concept of joint public-private management of public infrastructure projects, Carr has

"cast himself into the forefront of a public issue so as to become a limited public figure," Fitzgerald v. Penthouse International, Ltd., 691 F.2d 686, 668 (4th Cir. 1982). Carr describes himself in the Interwest Carolina proposal for the Southern Connector as having been "instrumental in the development of several public-private partnerships, most notably the Central Arizona Water Treatment Plant.[22] The Arizona Republic called Carr "the lead player" in a proposed public-private toll road in Phoenix, Arizona.[23] The managing principal of Interwest's parent company has described Carr as "the leader" in the development of the public-private partnership concept marketed by Interwest and has stated that Carr was the most publicly prominent figure involved in the Southern Connector project.[24] Furthermore, his role in this regard involved extensive interaction with government and elected officials in the promotion and development of such projects.

Understandably, the public-private development and management concept has attracted extensive media coverage nationwide. Well before the Southern Connector project, "public-private partnerships" promoted by Carr and his companies had created a public controversy not only as

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22 Interwest Carolina Response to Request for Proposals for the Southern Connector, p. t4 (Exhibit A-6 to Affidavit of George W. Price).

23 Toll Road Point Man Off Project," The Arizona Republic, June 4, 1997.

24 Deposition of James. P. Roubal at 31, 44,

to individual projects but also regarding the wisdom and propriety of placing public works (and often public money) in private hands. As both the "project leader" or "principal manager" on many of these proposed projects and a leading promoter of the public-private partnership concept in general, Carr assumed a prominent place in this controversy, and was the subject of significant media attention. Often this attention was invited and even solicited by Carr himself.

With regard to the Forbes article, Carr satisfies all five elements of the Fourth circuit's test for limited purpose public figure status, See Fitzgerald, 691 F.2d at 668. First, there is and has been a public controversy surrounding public-private development in general as well as the specific public works projects discussed in "Moonshine Bonds." See id. at 868-69. Dozens of newspaper and magazine articles, many of which focus on Carr and projects in which Carr has played a leading role, evidence this fact.

Second, Carr has had ample "access to channels of effective communication" with regard to this controversy. Id. at 669. Carr has written numerous editorials and letters to the editor promoting his public-private projects. As noted above, he has solicited the press to influence its coverage of such projects; he has been extensively covered by the media; and he has participated in numerous public meetings and addressed and advised elected and appointed officials in conjunction with his role in those projects. And with regard

to the Southern Connector project in particular, his group paid a lobbyist/public relations firm over $1 million to promote the project to the local community,

Third, in promoting these public-private projects (including the Southern Connector), Carr has "assumed a role of special prominence" in the controversy that surrounds there, frequently acting as the "leader" of and prominent spokesman for these projects. Id. He and his employers admit as much, especially with regard to the Southern Connector.

Fourth, it goes without saying that Carr has "sought to influence the resolution or outcome of the controversy" surrounding his public-private projects, Id. Carr's whole purpose for participating in the public debate surrounding his public-private projects has been to make those projects a reality by obtaining public approval for them.

Finally, there is no question that Carr was a public figure at the time "Moonshine Bonds" was published, Early in 1997, The Greenville News reported that problems with another of Carr's public-private projects had prompted the South Carolina Attorney General to investigate Interwest, [25] ,and that multiple fraud suits regarding that project had

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[25] "Earlier Project's Woes Move Connector's Foes to Demand State Probe of Developer," The Greenville News, February 7, 1997.

been filed.[26] Carr figured prominently in these articles. And the month before "Moonshine Bonds" was published, The Arizona Republic reported that Carr had been removed from the public-private toll road project that Interwest was pursuing in Phoenix.[27] Further, at the time "Moonshine Bonds" was published, Carr's public-private projects were the subject of multiple criminal investigations, civil suits, and bankruptcies.

Courts have consistently deemed individuals in circumstances similar to Carr's to be public figures when the subject of the alleged defamatory statement related to their involvement with controversial government programs. In Reuber v, Food Chemical News, Inc., 925 F.2d 703 (4th Cir. 1991), the Fourth Circuit sitting en banc held that a scientist conducting research for a federal agency under contract was a limited purpose public figure with regard to an article in a research journal criticizing his work. The Reuber Court noted that, like Carr, the scientist was "no stranger to the . . . political debates" related to the article, Reuber, 925 F.2d at 708, that media coverage and testimony before government agencies afforded him "channels of communication," id, at 708, and that he had "described himself as 'eminent' in his field." Id. at 709. The Reuber Court recognized that a plaintiff like the scientist in that

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[26] Southern Connector Firm Faces A Second Fraud Suit in Arizona," The Greenville News, Feb. 15, 1997.

[27] Toll Road Point Man Off Project," 'he Arizona Republic June 4. 1997.

case might not desire to be a public figure, but noted that "even 'involuntary' participants can be public figures when they choose a course of conduct that invites public attention." Id. at 709.

Even more closely on point to the facts of this case, the Third Circuit has held that an architect "who has participated in numerous public building projects" was a public figure with regard to alleged defamatory statements about his work 'on those projects, McDowell v. Paiwonsky, 789 F.2d 942 (3d Cir. 1985). As in this case, the McDowell Court found that public money, a public works project, and possible conflicts of interest on the part of the plaintiff with regard to those projects were sufficient to create a "public controversy." Id. at 948. Further, the McDowell Court found that, like Carr, the architect in that case "was the subject of significant public notoriety and scrutiny well before" the alleged defamation. Id. at 949. Accordingly, it found that the architect was significantly involved in the public controversy in question and was thus a public figure.[28] Id,

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[28] The McDowell Court noted that the architect's role in public works projects was sufficient to render him a public figure with regard to those projects even if he had no desire to receive public attention or scrutiny. The Court stated, "'Where a person has, however, chosen to engage in a profession which draws him regularly into regional and national view, and leads him to "fame and notoriety in the community," even if he has no ideological thesis to promulgate, he invites general public discussion." McDowell, 769 F.2d at 950 (quoting Chuy v. Philledelphia Eagles 431 F. Supp. 254, 287 (E.D Pa. 197911. In this case it appears that Carr has had an ideological agenda -the public-private

at 950.

Other courts have followed the general reasoning of Reuber and McDowell in finding plaintiffs similar to Carr to be public figures by virtue of their prominent involvement in public affairs, no matter how local the context. In Nicholson v. Promoters On Listings, 159 F.R.D. 343 (D, Mass. 1994), the District Court for the District of Massachusetts found the manager of a municipal auditorium to be a public figure with regard to a publication accusing him of fiscal mismanagement.

In doing so it noted:

> *Local governance, no less than national governance . . . is the concern of all in an open and democratic society. At an abstract level, the management and operation of a municipal auditorium implicate concerns relating to the efficacy of local governance and the integrity of the public fisc. Thus, alleged mismanagement and fiscal impropriety in such an area are inevitably of concern to the public.*

Id. at 352. Here, it is self evident that the very public-private concept for public works that was promoted by Carr implicated "concerns relating to the efficacy of local

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concept - that is worthy of public discussion.

governance and the integrity of the public fisc." Id. Thus, in assuming a prominent role in various public-private public works projects, Carr became a public figure with regard to them.

In short, the record before the Court demonstrates overwhelmingly that, as a matter of law, Carr was a public figure in relation to the controversy that was the subject of "Moonshine Bonds." Having found Plaintiff to be a public figure in relation to the controversy at issue, the Court must next determine whether Plaintiff has shown that he can establish at trial, with proof sufficient to support a jury finding of clear and convincing evidence, that Defendants acted with actual malice. The Court finds that Plaintiff has failed to meet this burden.

In order to sustain his burden of proof on the issue of actual malice, Plaintiff must:

> *demonstrate with clear and convincing evidence that the defendant[s] real' a that (the article) was false or that [they] subjectively entertained serious doubt as to the truth of [the article].*

Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485, 510

n.30; 104 S.Ct. 1949, 1965 n.30 (1984) (emphasis added; citations omitted).

> *[R]eckless conduct is not measured by whether a*

reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant l fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added). "Failure to investigate does not in itself establish bad faith." Id. at 733.

These rigorous standards were recently reaffirmed by the South Carolina Supreme Court:

Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The constitutional actual malice standard requires a public official Car public figure) to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant ' a f entertained serious doubts as to the truth of his publication." There must be

evidence the defendant had a "high degree of awareness of . probable falsity. "

Elder v. The Gaffney Ledger, Op. No. 25153, Shearouse Adv. Sh. No. 24, at 9 (S. C. June 19, 2000) (emphasis in original) (quoting St. Amant; Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

The author and fact-checker of the article have stated in their affidavits and

depositions that they were very confident of the truth of the statements in the

article at the time it was published. The sources used for the article were considered knowledgeable and reliable, and what they said was backed up with public documents. Carr himself confirmed to Schitrin and Johnson many of the facts reported in the article. Neither Schifrin nor Johnson had any prior knowledge of Carr or Interwest, and George Price noted in his affidavit that, when he spoke with Schifrin, "the impression I got from him was that he was only interested in the question of whether the bonds were a viable way to do the financing of the project. He did not appear to be 'after' Mr. Carr or anyone else, but just was concerned with whether these were 'junk bonds.[29]

Thus, defendants have done more than simply make a conclusory denial of malice. They have presented a specific

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[29] Affidavit of George Price, P1, P3.

and detailed showing of the thoroughness of their investigation and the grounds for their good faith belief in the truthfulness of the allegedly defamatory statements in the article. By contrast, Plaintiff, who tears the burden, has failed to corne forward with evidence that would justify a jury concluding that there is clear and convincing evidence of actual malice, Carr's argument on this issue consists of three parts, each of which is addressed below: (7) his charge that Schifrin relied on biased sources; (2) his complaint that Schifrin did not interview all those persons whom Carr thinks he should have interviewed; and (3) the opinion of Carr's "journalism experts" that Forbes departed from "applicable standards of journalism" in that the article was not "balanced and fair."

First, the record demonstrates that Schifrin did not rely on the uncorroborated statement of either of the sources whom Carr considers biased; instead, the article was based, in part, on information in documents provided by those sources.

Carr does not dispute the authenticity of those documents, and he does not point to a single allegedly defamatory statement in the article that came solely from the mouth of a "biased" source. Further, the record is replete with evidence that Schifrin conducted ran extensive investigation in addition to talking with the sources who provided information that Carr does not like. Schifrin interviewed Carr and other members of Carr's team, and he reviewed and analyzed numerous documents.

Thus, this case is simply not a situation of an article being printed "on the basis of an admittedly unreliable source, without further investigation," as Plaintiff argues.

Second, it is black-letter law that failure to investigate further does not constitute malice. St. Amant, 390 U.S. at 731. The law does not require Forbes to track down every possible source or to interview every person whom Plaintiff believes should have been interviewed. Levan v. Capital Cities/ABC, Mc., 190 F.3d 1230, 1243 (11th Cir. 1999). In this case, the record is clear that Schifrin interviewed people on both sides of the story. The record is equally clear, indeed compelling, that Schifrin had a good faith basis for the conclusions he expressed in his article. Carr cannot prove actual malice simply by asserting that Schifrin should have talked to additional people on Carr's side.

That Forbes chose to discount Carr's explanations and excuses is not evidence that it in fact had doubts as to the truthfulness of the article. Denials by public figures to media charges are part and parcel of free discussion about public affairs. The mere fact that a defamation defendant knows that the public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations.

As the United States Supreme Court has noted, "'such

denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'" Harte-Hanks Communications Inc. v, Connaughton, 491 U.S. 657, 692 n.37 (1989) (quoting Edwards v. National Audubon Soc'y, 556 F.2d 1 13, 121 (2d Cir. 1977)).

Finally, as to the opinions of the "journalism experts," the Fourth Circuit has held that it is reversible error to instruct the jury that actual malice may be established merely "by showing a departure from accepted journalistic practices." Reuber, 925 F.2d at 711. The sole authority on which Plaintiff reties for his contention that the "expert" opinions are evidence of malice, Elder v. Gaffney Ledger, 333 S.C. 651, 51 1 S.F.2d 383 (Ct. App. 1999), was reversed by the South Carolina Supreme Court. Elder v. The Gaffney Ledger, Op. No. 25153, Shearouse Adv_ Sh. No. 24 (S.C. June 19, 2000).

Moreover, the "balance and fairness" standard advocated by Plaintiff's experts are not the applicable legal stand d. The First Amendment protects a can demonstrate no damage or injury if the Order is placed under seal; and r3) failure to place the Order under seal pending appeal will result in hardship and irreparable harm to Plaintiff if the Order is eventually reversed,

It is significant that the Plaintiff made no request to seal any other pleadings or evidence presented in this litigation,

even though the Plaintiff now complains that the Order of this Court should be sealed from the public. However, Plaintiff provides no satisfactory justification for this highly unusual request.

Case law has been clear, in providing that judicial proceedings are intended to be open to public scrutiny. As Judge Easterbrook of the Seventh Circuit noted in a 1992 opinion:

> *Judicial proceedings in the United States are open to the public - in criminal cases by constitutional command, and in civil cases by force of tradition. What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records . . . . Any step that withdraws an element of the judicial Process from public view makes the ensuing decision look-.ore like fiat; this requires rigorous iustification.*

Matter of Krynicki, 983 F,2d 74, 75 (7th Cir, 1992) (emphasis added) (citations omitted).

In support of his motion, the Plaintiff cites only one case, In re Knight Publishing Co., 743 F.2d 231 (4th Cir. 1984). That case supports publication of this Court's Order. First, the

Knight case confirms the fundamental common law right of the public to have access to, inspect, and copy judicial records.[30] Unlike the request here, which involves the Court's decision resolving this case, Knight involved a request, in a criminal case, for access to certain sealed motion documents which identified, among other things, the name of a confidential informant for the government; a complaint and arrest warrant that identified the informant; hearsay statements likely to prejudice defendants in pending criminal trials; and impertinent and scandalous material irrelevant to the issues in the trial. Other than this very sensitive or completely irrelevant information, all of the information involved in the motion documents in Knight was released. Knight did not involve any request to seal the Court's decision itself with respect to any of the subject documents.

At issue here are not documents underlying the Court's Order in this case. As noted above, there has been no request to seal the motions for summary judgment, the supporting memoranda, or the volumes of documents and affidavits presented in support thereof. To the contrary, the Plaintiff has moved to seal only the Court's Order itself.[31]

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30 Knight 743 F.2d at 235.

31 It Is difficult to imagine how sealing the Court's Order, in light of the pleadings already on file and available for public review in this case, will do anything to help the Plaintiff minimize the impact of his actions in bringing and losing this lawsuit, It is. very much akin to shutting the proverbial barn door after the horse has long fled.

Despite the opportunity to challenge or rebut the factual findings submitted by the Defendants that support the Court's Order, the Plaintiff remained silent !"Plaintiff respectfully declines specific comment"), choosing instead to present no argument stronger than a general claim that the proposed Order "is rife with unsubstantiated conclusary statements couched as 'fact,'" and a contention that "every relevant proposed finding of fact was contradicted by other relevant and more convincing evidence than that adduced in support of the Defendants' position. [32]

As the Plaintiff's own authority makes clear, there exists a presumption in favor of public access to court records. Knight, ?43 F.2d at 235. This presumption has been recognized by other circuits as well.[33] The burden of demonstrating that justice requires the denial of access to

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[32] Given Letter from counsel for the Plaintiff to the Court dated October 20, 2000.

[33] See, e.g.. In re Application of Narlonal Broadcasti.g Co. (United States v. Myers], 836 F.2d 945, 952 (2d Cir. 1980) ("only the most compelling circumstances should prevent contemporaneous public access"); In re Application of National Broadcasting Co. (United Star" v_Criden) 648 F.2d 814, 823 (3rd Cir. 1981? ("strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination"1: United Stares v. Hubbard, 850 F.2d 293, 317 (D.C. Cir. 1880) ("important presumption in favor of public access"): United States v. Edwards, 872 F.2d 1289, 1294 (7th Cir. 1982) ("Me hold that there is a strong presumption in support of the common law right to inspect and copy judicial records."),

court records falls squarely on the party "seeking to interfere with a fundamental common law right . . . ." United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 198,2) (citing Nixon v. Warner Communications, 435 U.S. 589, 98 S. Ct. 1308 (1978)).

Plaintiff here has failed to overcome the strong presumption in favor of contemporaneous public access to the Court's Order. While the authorities require that a district court provide specific findings to support its decision to seal records, the Plaintiff has offered nothing to assist this. Court in making such findings. Given the feeble effort the Plaintiff has made to justify such a radical move, the question Judge Easterbrook asked in Krynicki seems appropriate:

> *Have the litigants . . . done more to justify the sealing of the briefs than the litigants in cases such as Pentagon Papers, where disclosure was said to threaten national security, and The Progressive, where disclosure was said to threaten the survival of mankind? Not exactly.*

Krynicki, 983 F.2d at 78,25

In Krynicki, Judge Easterbrook lamented the fact that the parties who requested the filing of sealed briefs did

very little to present any justification for their requests. One of the matters involved a criminal case, the other a civil matter - a quarrel between wealthy siblings over an estate. In both cases ,fudge Easterbrook refused to seal the appellate briefs, stating with respect to the civil case that

> *defendant omits any argument that might show why the information should be secret, That journalists are interested in the events underlying litigation is neither unusual nor deplorable. Judicial proceedings are not closed whenever the details are titiflating, and open only when the facts are so boring that no one other than the parties cares about them.*

Id. at 78.

The Plaintiff, a public figure, has failed to meet his burden of establishing any legitimate basis for which to seal this Court's Order from all public view, especially in light of the fact that all other pleadings and evidence in this case are available to the public. For alt the foregoing reasons, the Plaintiff's Motion to Seal the Court's Order Pending Appeal is denied.

III CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Sealt Order Pending Appeal is DENIED.

IT IS SO ORDERED,

Signed

G. Ross Anderson, Jr.

United States District Judge

November 9th, 2000

Anderson, South Carolina